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No. 94-1846

In The

Supreme Court of the United States

October Term, 1994

JAMES A. BARNARD,

Petitioner,

v.

JACKSON COUNTY, MISSOURI, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the Petition for Writ of Certiorari submitted by Petitioner, James A. Barnard.

STATUTORY PROVISIONS

In addition to those constitutional and statutory provisions cited by the Petitioner, Respondents submit the following to this Court:

Jackson County Code Sections (excerpts reproduced in Respondents' Appendix)

STATEMENT OF THE CASE

The Jackson County Legislature hired James Barnard as its legislative auditor in 1985. His duties included the preparation of internal performance audits of various county departments and the performance of such audits as the County Legislature directed him to do. Mr. Barnard's audits were to be presented directly to the Legislature. [App. 1a]

In late 1989, the Jackson County Legislature directed Mr. Barnard to audit the office of the Jackson County Medical Examiner. The original scope of the audit request is disputed. However, on March 2, 1990, a written memorandum was issued to Mr. Barnard by the Chairman of the Legislature, Respondent James Tindall, defining the scope of the audit. Mr. Barnard admittedly ignored the memorandum and subsequent oral directives, and included in the final audit both material and personal opinions which were not requested, and which were highly inflammatory. Included in this material were allegations of misconduct directed toward the then County Executive and County Counselor, and opinions of Mr. Barnard about the propriety of outside contracts entered into by the Assistant Medical Examiner with a local hospital. The subject of the outside contracts had been raised several months previously before the County Legislature, and had been the subject of coverage by the news media.

Over the course of his employment as legislative auditor, Mr. Barnard had incurred the disapproval of members of the County Legislature by exceeding the scope of audits requested by them, and by discussing

such audits and the information contained therein with members of the press prior to presenting the audits to the Legislature. Several months before he issued the Medical Examiner's audit, Mr. Barnard was publicly reprimanded by the Legislature for his work on an audit of the Jackson County Sports Authority. Additionally, Legislators complained that they were being subjected to inquiries about audits from the press or their constituents before the audits had been presented to them by their auditor.

Sometime in the spring of 1990, Mr. Barnard was given a copy of the "Communications Guidelines" referred to in Petitioner's Petition for Writ of Certiorari at page 6. It is undisputed that the purpose of those guidelines was to control only communications prior to the presentation of the final audits. It is also undisputed that Mr. Barnard understood this to be the purpose of the guidelines.

At a meeting with the County Legislature in May 1990, after he had been given the "Communications Guidelines" and had agreed to abide by them, Mr. Barnard was formally instructed to defer any conversation about his audits with the press until such time as the Legislators had been provided a copy of the audits for their own review. Mr. Barnard admits that he agreed to comply with this request. He has also admitted that, although he told the Legislature he would comply, he never had any intention of doing so. The Legislators' request that they receive the audits before the information therein was disseminated to the press was in accord with County Ordinance, which required that audits be released directly to the Legislature, the County Executive, and the Clerk of the County Legislature. [App. 1a]

Subsequent to his agreement not to discuss audits prior to their presentation to the Legislature, and before he presented the Medical Examiner's audit, Mr. Barnard met with members of the *Kansas City Star* editorial board and discussed with them information contained in his not-yet-released audit. His avowed purpose in doing so, according to his testimony in this case, was to garner their support for the positions which he was taking in the audit, and to attract the attention of his employer, the County Legislature.

No press coverage resulted from his pre-presentation meeting with the editorial board. Shortly after Mr. Barnard's meeting with the press, he presented the Medical Examiner's audit to the Legislature. Some limited press coverage followed. Much of the information contained in the audit had not been the subject of prior media coverage.

Approximately two months after his presentation of the Medical Examiner's audit, James Barnard was discharged by Respondents. Each Legislator participating in the vote has testified to his or her individual reasons for voting to discharge Mr. Barnard. Several, but not all, of the Legislators stated that their reasons for discharge included Mr. Barnard's violation of his agreement not to discuss audits with the press before their presentation to the Legislature. Collectively, the legislative Respondents have testified that Mr. Barnard's discharge was a result of his poor job performance, his lack of qualifications for the position, and his refusal to follow the directives given him by his employer, the County Legislature.

Petitioner filed suit against the County and the seven individual County Legislators who voted to discharge him, based on 42 U.S.C. §1983. He alleged his first amendment rights were violated by his discharge. The district court granted summary judgment in Defendants' favor. In making its decision, the district court assumed that there were matters of public concern in the Petitioner's speech, contrary to Petitioner's assertion in his Statement of the Case.[1] The Eighth Circuit Court of Appeals affirmed the summary judgment. Mr. Barnard's Petition for Writ of Certiorari followed.

SUMMARY OF THE ARGUMENT

The Eighth Circuit's opinion does not conflict with decisions of the Seventh Circuit. Petitioner's speech was not limited to matters which had already been publicly reported in newspapers, and the Respondent's interest as an employer in delivering efficient government services outweighed Petitioner's interest in speaking about his audits prior to their presentation to the legislature.

Nor did the Eighth Circuit engage in prohibited fact finding. The Eighth Circuit, relying on the undisputed facts developed by the record, correctly concluded that Respondents' interests outweighed Petitioner's pursuant to the *Pickering* balancing test.

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[1] Petitioner erroneously states at page 9 that "the district court . . . [held] that as a matter of law Barnard's discussion with the *Star* editors did not touch upon matters of public concern."

REASONS FOR DENYING THE WRIT

I. The Eighth Circuit opinion does not conflict with decisions of the Seventh Circuit.

II. The Eighth Circuit did not engage in prohibited fact finding, and did not deny Petitioner his constitutional right to a jury trial.

ARGUMENT

The Petition for Writ of Certiorari should be denied. The Eighth Circuit's opinion is not in conflict with decisions of other circuits. The issues presented in the Petition have already been decided by this Court, and the Eighth Circuit acted in accordance therewith.

I. THE EIGHTH CIRCUIT'S OPINION DOES NOT CONFLICT WITH DECISIONS OF THE SEVENTH CIRCUIT.

Initially it should be noted that nowhere in the record is there evidence that the content of Petitioner's speech led to his discharge. Rather several of the Respondent Legislators testified that Mr. Barnard's violation of his agreement to follow the appropriate procedure, i.e. presenting an audit to the Legislature before publicly discussing it, contributed to their decision to vote for discharge. In any event, the Eighth Circuit affirmed the district court's decision that the procedure in question, requiring the legislative auditor to present his audits to him employer before discussing them with the press, did not violate the auditor's first amendment rights. In so

deciding, the district court and the Court of Appeals engaged in the appropriate analysis as pronounced by this Court.

A. Petitioner's Speech Was Not Confined to Matters Already Publicly Reported in Newspapers

Petitioner consistently asserts that, in speaking with the editorial board of the *Kansas City Star* about his not-yet-presented audit, he was not divulging new or confidential information. His position is that because the subject matter addressed by the audit had been the subject of news articles prior to his release of the audit, he was not required to follow the procedure requested by the Legislature, and by which he had agreed to abide. At most, the record reflects that general issues which were addressed in Petitioner's audit of the Jackson County Medical Examiner's Office had been mentioned in published news reports. There is no indication that the audit itself, or the results of the auditor's investigation and his conclusions, had previously been discussed in the press.

Petitioner admits that in May 1990 he assured the County Legislature that he would follow its directive to present his audits to the Legislature before discussing them with the press. He also admits that in June 1990, prior to his presentation of the Medical Examiner's audit to the Legislature, he met with the editorial board of the *Kansas City Star* to discus the contents of the audit. The purpose of that meeting, according to Petitioner's deposition testimony, was to enlist the *Star* to support the conclusions and recommendations he had made in the audit, and to "catch" the attention of the County Legislature. At

no time has Petitioner suggested that his conclusions and recommendations had been disclosed to the press, or reported by the media, prior to his meeting with the editorial board.

B. The Seventh Circuit Decisions Cited By Petitioner Are Distinguishable

Petitioner asserts that this case is appropriate for review because of an alleged conflict in the circuits. In support of this assertion, Petitioner cites two Seventh Circuit cases which allegedly conflict with the Eighth Circuit's opinion herein. A review of the cases cited by Petitioner, and of more recent Seventh Circuit case law, illustrates that no conflict exists.

In *Hanneman v. Breier,* 528 F.2d 750 (7th Cir. 1976), police officers brought a class action lawsuit against the Chief of Police and the city, asserting that discipline imposed on police officers under a department rule prohibiting disclosure of confidential police business violated their first amendment rights to free speech. The plaintiffs were members of a police union. Certain of the named plaintiffs were the subjects of an internal investigation into whether they had engaged in prohibited political activity. Plaintiffs had been instructed to keep the investigation confidential. During the investigation, a front-page story in the local newspaper disclosed that an internal investigation into the political activity of the union officers was underway. The following day, Plaintiffs sent a letter to the mayor, the city council, the city's labor negotiator, and the state labor board confirming

that they had been questioned about their political activities. As a result of the letter, the Plaintiffs were found guilty of violating the department's confidentiality rule, and were disciplined.

The Seventh Circuit engaged in the same analysis employed by the Eighth Circuit in the instant case. Following the balancing test set forth in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), the court found that a police department regulation which prohibits employees from disclosing the confidential business of the department was valid. *Hanneman v. Breier, supra,* at 754.

> . . . A general confidentiality rule prevents improper use of inside information obtained in the course of public employment. The rule curtails the publication of inaccurate or misleading statements which might result from premature disclosure of pending matters. It further insures that the public will not erroneously attribute to the police department a statement made by a single officer without official sanction. The regulation essentially prevents the public employee from abusing the public confidence which inheres in his position.

However, under the facts presented in *Hanneman*, the Seventh Circuit found that the interests of these police officers in confirming prior press reports about an internal police investigation outweighed the valid governmental interest inherent in the confidentiality rule. In coming to this conclusion, the Court noted that the information contained in the officers' letter had appeared in published news reports, and that the individual state and city decision-makers to whom the letter was addressed "were particularly concerned with its allegations because

of their responsibilities either with respect to the negotiation and adoption of the collective bargaining agreement or with respect to public employer-employee relations generally." *Id.* at 755-56. The Court further noted that the officers did not have a close working relationship with their employer, but were in fact "apparent adversaries" in the then-current collective bargaining situation. *Id.* at 755.

Similarly, in *O'Brien v. Town of Caledonia*, 748 F.2d 403 (7th Cir. 1984), a police officer challenged disciplinary proceedings against him based on his alleged violation of a departmental confidentiality rule. Plaintiff O'Brien had been involved in two controversial arrests, which apparently had political overtones. In one situation, O'Brien had been told by the Chief of Police not to issue citations against the Town Supervisor. O'Brien issued the citations anyway. Concerned for his job, O'Brien discussed the situation with his attorney, the local District Attorney, the Chief Judge of the Circuit Court, and the FBI. He also responded to certain questions from the media. As a result of these discussions the Chief of Police initiated an internal investigation to determine whether O'Brien had violated departmental confidentiality rules.

As in *Hanneman*, the Seventh Circuit applied the balancing test set forth in *Pickering*. The court concluded that O'Brien had an overwhelming interest in his speech, the subject matter of which was his perception of potential graft and corruption. This interest outweighed the Department's legitimate interest in confidentiality of police affairs. "It appears that O'Brien's alleged breach of the confidentiality rule was necessary to the presentation of the important public issues and there was no evidence that it was gratuitous or manipulative." *Id.* at 407. The

court further noted that O'Brien took his concerns to the appropriate external authorities.

In contrast, Petitioner herein has admitted that his motive in deliberately violating his agreement to refrain from discussion of his audits until they had been presented to the Legislature was entirely manipulative. He desired to enlist the support of the *Star's* editorial board for the positions he had taken in his audit, and wanted to force his employer's attention to the material in the audit through external pressure from the paper's coverage.

In affirming summary judgment, the Eighth Circuit employed the same *Pickering* balancing test used by the Seventh Circuit in the *Hanneman* and *O'Brien* cases. The *Pickering* test requires courts to strike a balance between the interests of the employee as a citizen in commenting upon matters of public concern, and the interest of the government as an employer in promoting the efficiency of the public services it performs through its employees. *Pickering, supra,* at 568. The Eighth Circuit correctly found the balance weighed in favor of Respondents.

Specifically, the court found that Petitioner's speech had an adverse impact on Respondents' ability to efficiently carry out legislative tasks, and had "the potential to erode citizen confidence in a competent and informed legislature." [Petition for Writ, p. 10a] The court also noted that several of the Respondents viewed Petitioner's violation of his own agreement regarding pre-release communications to be an act of insubordination and misconduct which undermined their confidence in him. The confidence was essential to his position, as the nature of

his duties required him to work in close harmony with Respondents.[2] [Petition for Writ, p. 11a]

Nor was Petitioner forbidden to speak. As the Eighth Circuit noted,

> . . . Barnard's "leaks" forced the legislature to enact the "Communcation Guidelines Pertaining to Legislative Auditor," which did not preclude Barnard from discussing audit results with the press but merely operated as a reasonable time restriction. As noted earlier, Jackson County Code §211.7 requires that once an auditor's report is released to the legislature it must ("shall") be placed on the agenda of the next meeting as new business. Once that occurred, Barnard was free to garner all the public support for his conclusions he could and in whatever way he could muster. . . .

[Petition for Writ, pp. 10a-11a]

Nothing in the Eighth Circuit's opinion conflicts with the decisions of the Seventh Circuit cited by Petitioner. All three cases were decided on the same analytical

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[2] Subsequent to the *Hanneman* case, this Court, in *Connick v. Myers*, 461 U.S. 138 (1983), emphasized the government's legitimate interest in controlling employee speech which is disruptive of internal operations. "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." *Id.* at 151-152.

framework, as directed by this Court. The factual differences in these cases merely gave rise to different results.

The Seventh Circuit has recently decided a case similar to the instant case and reached a similar result. In *Wright v. Ill. Dept. of Children & Family Services,* 40 F.3d 1492 (7th Cir. 1994), the Seventh Circuit held that a public employee who disseminated an internal report to outside sources in violation of a departmental policy was properly disciplined.

Wright was a social worker responsible for reviewing allegations of child abuse to determine what services should be offered to victims, in this case a victim known as CS. Wright and her supervisors quickly developed a conflict as to how the case should be investigated, and as to what conclusions should be drawn from the information disclosed by the investigation. The Department, after lengthly investigation, concluded that no abuse had occurred. Wright disagreed with this conclusion, and filed a written report with a juvenile court judge outlining his own position. The Department was thus in the position of having its official position with the court contradicted in a document filed by one of its own employees. Wright was reprimanded for "[k]nowingly submitting a report to the court on the CS case without obtaining prior supervisory approval," in violation of departmental policy. *Wright, supra,* at 1503. On the facts presented, the court found that "the Department's interests in maintaining discipline within its ranks, insuring harmony among co-workers, and enforcing its policies with respect to contact between the Department and judiciary outweighed Wright's interest in communicating her concerns about the investigation to the court . . . "

It is undisputed that no published reports of the conclusions reached in Petitioner's audit had been made prior to his meeting with the editorial board. Unlike the Seventh Circuit cases cited by Petitioner, the facts of this case establish that the communication for which Mr. Barnard alleges he was discharged was manipulative in nature, was in direct contravention of his own agreement with his employer, and was disruptive of his working relationship with Respondents. Additionally, the curtailment of speech in the instant case was not a blanket prohibition on speech, but rather a control on the timing of the speech calculated to afford the Legislators the opportunity to do their jobs efficiently.

There being no conflict in the circuit courts, the Petition for Writ of Certiorari should be denied.

II. THE EIGHTH CIRCUIT DID NOT ENGAGE IN PROHIBITED FACT FINDING, AND DID NOT DENY PETITIONER HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL

Petitioner correctly asserts that the question of whether a public employee's speech is entitled to first amendment protection is one of law. *Rankin v. McPherson*, 483 U.S. 378 (1987). Whether the Respondents' interests outweigh Petitioner's asserted first amendment interest is also a question of law for the Court to decide. *Connick v. Myers*, 461 U.S. 138, 148 n.7, 150 n.10 (1983) Petitioner contends that the Eighth Circuit, in making these legal decisions, has engaged in fact-finding which should be left to a jury. Petitioner's contention is without merit. The Eighth Circuit's decision was founded upon facts which

were not in dispute, or which had been admitted by Petitioner.

The particular facts which Petitioner claims were "found" by the Eighth Circuit are as follows: 1) That Petitioner prematurely disclosed confidential information to the press on frequent occasions; 2) that legislative tasks were disrupted and that this disruption was caused by Petitioner's "leaks;" and 3) that a close working relationship was required by Petitioner's position. Each of the facts "found" by the Eighth Circuit are uncontroverted or admitted.

Mr. Barnard has admitted that he met with members of the local press and discussed with them information contained in audits which had not yet been presented to the County Legislature. It is uncontroverted that Legislators had complained that they were being subjected to inquiries about Petitioner's audits from the press and their constituents prior to presentation of the audit to them. Finally, an exhaustive description of Petitioner's job duties and of the auditor's relationship with the County Legislature appears in the record. That description is given mostly by Petitioner himself. It is certainly not inappropriate for the Eight Circuit to rely on the undisputed facts which are established by the record.

This case was before the court on a motion by Respondents for summary judgment. To defeat summary judgment, Petitioner was required to delineate specific material facts demonstrating a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Petitioner failed to do so. The facts relied upon by the Eight Circuit were uncontroverted, and the Eighth Circuit drew

the correct legal conclusions from them. Petitioner was not deprived of his right to a jury trial.

CONCLUSION

The Eighth Circuit employed the correct analysis in determining that Respondents' interests outweighed Petitioner's under the *Pickering* balancing test. Its opinion is not in conflict with the decisions of the Seventh Circuit. Petitioner's violation of his agreement not to discuss the results of his audits prior to their presentation to the County Legislature was an act of insubordination; the information that Petitioner disclosed to the press was not previously in the public domain, namely the results of Petitioner's audit investigation and his own conclusions and recommendations based thereon.

It is entirely appropriate for a court to rely on undisputed facts in ruling on a motion for summary judgment. Petitioner was not deprived of his right to a jury trial.

For these reasons, Respondents respectfully urge the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX
EXCERPT FROM COUNTY ORDINANCES

JACKSON COUNTY CODE:

211.7 *Release of Report*

The Auditor shall release his reports directly to the County Legislature, the County Executive and the Clerk of the County Legislature who shall place the report on the agenda of the next meeting of the County Legislature under new business.